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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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10/688,374

10/17/2003

Richard Boroviak

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11/03/2006

SCHACHT LAW OFFICE, INC.  
SUITE 202  
2801 MERIDIAN STREET  
BELLINGHAM, WA 98225-2412

EXAMINER

CHAN, KO HUNG

ART UNIT

PAPER NUMBER

3632

DATE MAILED: 11/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                                      |   |  |
|------------------------------|--------------------------------------|---|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>10/688,374 | <b>Applicant(s)</b><br>BOROVIK, RICHARD |  |
|                              | <b>Examiner</b><br>Korie H. Chan     | <b>Art Unit</b><br>3632                 |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 17 August 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 18-42 is/are pending in the application.
- 4a) Of the above claim(s) 30-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 18-29 and 37-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Claim Rejections - 35 USC § 112***

Claims 18-29 and 37-42 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. New independent claim 18 is replete with terms that lacks antecedent basis such as "the first brace assembly on line 5," "the second brace assembly" on line 11, "the first proximal brace assembly" on line 17. Applicant is advised to review the claim and all claims depend therefrom entirely for such vagueness. Further, regarding claims 18-29, it is not clear what is meant by "fixed base on a 1<sup>st</sup> dimension of the distal (or proximal) vertical support member" found throughout the claims. It is indefinite to define the structural features of the claimed subject matter relative to the dimensions of the unclaimed or intended use article (e.g. vertical and horizontal support members) where such intended use articles dimensions are infinite. Claims 19, 20, 24-26 are indefinite as they do not set forth any structural features involved in the bracket system claimed. The bracket system set forth in independent claim 18 is adapted or intended to be connected to "distal and proximal vertical support members and upper and lower horizontal support members" which means the claimed bracket system does not encompass the distal and proximal vertical support members and upper and lower horizontal support members; however claims 19, 20, 24-26 only recites the dimensional directions of the non-claimed device of the distal

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and proximal vertical support member and lower and upper horizontal support members which is indefinite as it is unclear what the bracket system applicant is intending to encompass. New independent claim 37, line 2, "the bracket system" also lacks proper antecedent basis. Regarding claim 42, line 2, "firs" appears to be misspelling of "first".

***Claim Rejections - 35 USC § 102***

Claims 18-27 and 37-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Artisticironworks (Non-patent literature provided in the previous Office action). As illustrated in the previous Office action, the adjustable sections in Artisticironworks can be selectively and suitably positioned along a structural member to which the brace assembly is to be attached and is fixed to its respective brace sections (triangularly shaped brace members).

Claims 37-39 and 41-42 are rejected under 35 U.S.C. 102(b) as being anticipated by Blessing (US patent no. 224,863). Blessing discloses a brace assembly comprising a brace section (c) and an adjustable section (B) whereby the brace is adapted to be connected to a vertical and horizontal support member and a position of the adjustable section relative to the brace section can be fixed; wherein a pair of cooperating openings (o, figure VII) are formed in the brace section (c) and the adjustable section (B) to allow fasteners (bolt and nut) to fix the position of the adjustable section relative to the brace section.

Regarding applicant's intended use of brace assembly for forming a gate assembly, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to

patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Blessing's brace assembly is capable of being used to form a gate.

### ***Claim Rejections - 35 USC § 103***

Claims 28, 29, 41-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over ArtisticIronworks in view of Blessing (US patent no. 224,863). ArtisticIronworks disclosed all the claimed features of applicant's invention except for projection formed in the adjustable section and void formed in the brace section and pair of cooperating openings formed in the brace and adjustable section. Blessing discloses a brace assembly comprising a brace section (c) and an adjustable section (B) whereby the brace is adapted to be connected to a vertical and horizontal support member and a position of the adjustable section relative to the brace section can be fixed; wherein a pair of cooperating openings (o, figure VII) are formed in the brace section (c) and the adjustable section (B) to allow fasteners (bolt and nut) to fix the position of the adjustable section relative to the brace section.

### ***Response to Arguments***

Applicant's arguments filed 8/17/2006 have been fully considered but they are not persuasive. Applicant argues that applicant's device is fixed base on the dimensions of the vertical support member is vague and indefinite. ArtisticIronworks adjustable section relative to the brace section is fixed. To say that they are fixed base on the dimensions of the vertical support member is encompassed by ArtisticIronworks

as well since the gate is formed rectangular or square where the ends of the horizontal member and vertical support member are aligned.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the suggestion and motivation to do so is found in the knowledge generally available to one of ordinary skill in the art. Both Artisticironworks and Blessing are concerned with providing a brace for the connection to a support member. It is well-known in the bracket supporting art that to provide adjustable parts to accommodate different sizes of support structures as demonstrated by Blessings. The teaching and combination to combine is well-known.

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Applicant's argument that such adjustment is based on the vertical support member is vague and indefinite. Blessing's brace assembly can be adjusted base on the vertical support member as well. Say if a horizontal support member is to extend beyond the vertical support member in a T-shaped connection, if a user does not want the horizontal member to extend beyond the vertical support member then one would adjust the horizontal member or adjustable member (B) of Blessing appropriately. Such intended use environment can be achieved by Blessing's brace assembly.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Korie H. Chan whose telephone number is 571-272-6816. The examiner can normally be reached on Monday - Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl Friedman can be reached on (571)272-6842. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Korie H. Chan  
Primary Examiner  
Art Unit 3632

khc  
October 30, 2006